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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. THOMAS JOEL KRAVITZ, Defendant and Respondent.	B199053 (Los Angeles County Super. Ct. No. SA014825)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edlen S. Fox, Judge. Reversed.

Steve Cooley, District Attorney, Lael R. Rubin and Roberta Schwartz, Deputy District Attorneys, for Plaintiff and Appellant.

Law Offices of Edelberg & Espina, Sherwin C. Edelberg and Claire N. Espina for Defendant and Respondent.

Plaintiff and appellant, People of the State of California, appeal the trial court's grant of habeas corpus relief to defendant and respondent, Thomas Joel Kravitz. The trial court ruled it would violate equal protection to impose mandatory sex-offender registration on Kravitz, who had been convicted of violating Penal Code section 288, subdivision (c)[1] (lewd or lascivious act by defendant 10 years' older than 14- or 15-year-old victim).

The judgment is reversed.

BACKGROUND

The District Attorney of Los Angeles County filed a complaint in 1993 charging Kravitz with eight counts of lewd conduct under section 288, subdivision (c)(1). Subdivision (a) of section 288 provides: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1,[2] upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

Subdivision (c)(1) of section 288, provides: "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child."

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 "Part 1" of the Penal Code encompasses sections 26 through 680.

The offenses were alleged to have been committed at various dates between 1991 and 1993. According to the police report,[3] Kravitz's conviction stemmed from conduct occurring when he was 46-47 years' old and the victim was 14-15 years' old. The victim, who had been having some problems at home, began spending time at her best friend's house. Kravitz was the best friend's mother's live-in boyfriend. Kravitz gave the victim massages that worked their way down her back, around to the front of her stomach, and then up to her breasts. Kravitz would lift her shirt, put his hands underneath her bra, and rub her breasts. This happened at least six times. Another time, they were lying on his bed and the victim could feel Kravitz becoming aroused as they rubbed against each other. On still another occasion, Kravitz unzipped the victim's riding pants, put his hand into her underpants, and inserted his finger into her vagina. The victim said she felt that "while Kravitz was rubbing and touching her, he was attempting to get her aroused." (CT 73)

On December 30, 1993, the day set for the preliminary hearing, Kravitz pled no contest to one count of lewd or lascivious conduct in violation of section 288, subdivision (c)(1). He was sentenced to five years' felony probation and ordered to register as a sex offender (§ 290). On December 20, 1996, the trial court reduced Kravitz's conviction to a misdemeanor and continued him on summary probation, which has since been terminated. (CT 7)

On October 5, 2006, Kravitz filed a petition for writ of habeas corpus which claimed that requiring mandatory registration as a sex offender under section 290 constituted an equal protection violation under *People v. Hofsheier* (2006) 37 Cal.4th 1185. On January 5, 2007, the trial court agreed, granted Kravitz's habeas corpus petition, and terminated his obligation to register as a sex offender.

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[3] Because Kravitz pled no contest on the day set for the preliminary hearing, the facts are taken from a police report prepared in May 1993.

CONTENTION

The People appeal, claiming that our Supreme Court's decision in *Hofsheier* does not apply to Kravitz.

DISCUSSION

Mandatory sex registration for violating section 288, subdivision (c)(1) does not violate equal protection.

The People contend the trial court erred by granting Kravitz habeas relief on the theory *People v. Hofsheier, supra,* 37 Cal.4th 1185, applied to his case. This claim has merit.

1. *Legal principles.*

" 'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' " (*In re Gary W.* (1971) 5 Cal.3d 296, 303.) "In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1200.) Under the rational relationship test, " ' " 'a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.]' " ' " (*Id*. at pp. 1200-1201, italics omitted.)

However, " '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1199.) "Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citation.]" (*Id*. at p. 1199-1200.) "If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

"[T]he sex offender registration requirement 'is intended to promote the " 'state interest in controlling crime and preventing recidivism in sex offenders.' " [Citation.] As this court consistently has reiterated: "The purpose of section 290[4] is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]" [Citations.]' " (*People v. Castellanos* (1999) 21 Cal.4th 785, 796.)

2. *Discussion*.

In *Hofsheier*, a 22-year-old man was convicted of violating section 288a, subdivision (b)(1),[5] for having engaged in voluntary oral copulation with a 16-year-old

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[4] Section 290, subdivision (c), requires sex-offender registration for enumerated crimes, including section 288, by providing that persons convicted of such crimes "shall be required to register." As an alternative to section 290, section 290.006 provides for discretionary registration: "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."

[5] Section 288a, subdivision (b)(1), states: "Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year."

girl. That statute applied to anyone participating in oral copulation with a person under 18. As a result of that conviction, Hofsheier was ordered to register as a sex offender under section 290, the mandatory registration statute. Our Supreme Court held this imposition of mandatory registration violated equal protection because there was no rational basis for distinguishing between Hofsheier's offense and the crime of voluntary sexual intercourse with a minor (§ 261.5, subd. (c))[6], which does not require mandatory registration.

Hofsheier pointed out that "[i]f defendant here, a 22-year-old man, had engaged in voluntary sexual intercourse with a 16-year-old girl, instead of oral copulation, he would have been guilty of violating section 261.5, subdivision (c), but he would not face mandatory sex offender registration." (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1195.) *Hofsheier* then held that defendants convicted of these two crimes were "similarly situated": "[S]ection 288a (b)(1) and section 261.5 both concern sexual conduct with minors. *The only difference between the two offenses is the nature of the sexual act*. Thus, persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors 'are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.' [Citation.]" (*Id*. at p. 1200, italics added.)[7]

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6 Section 261.5, subdivision (a), provides: "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a 'minor' is a person under the age of 18 years and an 'adult' is a person who is at least 18 years of age."

Subdivision (c) of section 261.5 provides: "Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison."

7 *Hofsheier* went on to hold there was no rational explanation for this unequal treatment: "In 1947, when the Legislature enacted section 290, voluntary oral copulation between adults was criminal although voluntary adult intercourse was not. Today, however, statutes treat oral copulation and intercourse similarly . . . . Mandatory lifetime

Kravitz's equal protection claim is based on the assumption *Hofsheier* applies to his case. As the People note, Kravitz in effect asserts "that if the lewd act he committed had instead been the act of sexual intercourse, he would not have been subjected to mandatory lifetime registration as a sex offender if he had been charged under section 261.5 subdivision (d)," (AOB 5) and that there could be no rational basis for such a result. Section 261.5, subdivision (d), would be the specific provision of the unlawful intercourse statute corresponding to Kravitz's lewd act conviction, given the age differential between Kravitz and his victim. Section 261.5, subdivision (d), applies to "[a]ny person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age . . . ."

But this equal protection claim fails "at the threshold" (see *People v. Buffington, supra,* 74 Cal.App.4th at p. 1155) because Kravitz, unlike Hofsheier, is *not* similarly situated to a person who violates section 261.5. Unlike Hofsheier, Kravitz was not subject to mandatory registration *only* because of the kind of sexual act he engaged in. That is because, as the People point out, there are two crucial distinctions between section 288, subdivision (c), and section 261.5, subdivision (d), distinctions that have nothing to do with the nature of the sexual act addressed by each statute.

First, section 288, subdivision (c), is a specific intent crime, whereas section 261.5 is a general intent crime. Section 261.5 prohibits "an act of unlawful sexual intercourse," which is defined as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor." Section 288, subdivision (c), on

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registration of all persons convicted of voluntary oral copulation in violation of section 288a(b)(1) stands out as an exception to the legislative scheme, a historical atavism dating back to a law repealed over 30 years ago that treated all oral copulation as criminal regardless of age or consent. [¶] We perceive no reason why the Legislature would conclude that persons who are convicted of voluntary oral copulation with adolescents 16 to 17 years old, as opposed to those who are convicted of voluntary intercourse with adolescents in that same age group, constitute a class of 'particularly incorrigible offenders' [citation] who require lifetime surveillance as sex offenders." (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1206-1207.)

the other hand, requires that the defendant commit a lewd or lascivious act "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [the defendant] or the child."[8] (§ 288 subd. (a).) The more culpable mental state required by section 288 is a meaningful distinction demonstrating that defendants convicted of violating these two statutes are not similarly situated. (See *People v. Sparks* (Colo.App. 1996) 914 P. 2d 544, 547 [equal protection claim fails because second degree assault's intent-to-cause-bodily-injury element is meaningfully different from third degree assault's knowingly-or-recklessly-causing-bodily-injury element].)

Second, while both section 288, subdivision (c), and section 261.5, subdivision (d), require the victim to be younger than 16, section 288, subdivision (c), also requires the defendant to be 10 years' older than the victim, whereas section 261.5, subdivision (d), only requires a 5-year differential, i.e., that the victim be under 16 and the defendant be at least 21. The greater age differential required by section 288 is a meaningful distinction demonstrating that defendants violating the two statutes are not similarly situated.

A defendant's age alone can provide a meaningful distinction between offense categories for equal protection purposes. (See *In re Arthur W.* (1985) 171 Cal.App.3d 179, 190-191 [longer minimum period of license revocation for minors convicted of DUI does not violate equal protection: "intoxicated drivers under 18 years of age are not similarly situated to adults" because "longer period of license revocation imposed upon minor offenders serves an additional state interest in the protection and safety of the

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[8] This is why an act violating section 261.5 would not necessarily violate section 288. (See, e.g., *People v. Pearson* (1986) 42 Cal.3d 351, 356 [section 288 lewd conduct is not lesser included offense of section 286 statutory sodomy because of former's specific intent requirement: "Defendant argues that 'it is inconceivable that a person can engage in sodomy on a child without at the same time committing a lewd and lascivious act on that child.' Although this may be accurate in a moral sense, it is not true that every such act is committed with the specific intent required in section 288. For example, an act of sodomy can be committed for wholly sadistic purposes, or by an individual who lacks the capacity to form the required specific intent."].)

minor, as well as the public at large"].) And, statutes such as sections 288 and 288a "provide[] a graduated scale of punishment *depending on the age of the parties* and the presence or absence of force or other coercion." (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1194, italics added.)

Because Kravitz is not similarly situated to a person who violates section 261.5, the *Hofsheier* decision does not help him. Because Kravitz does not even attempt to delineate any other category that would qualify as similarly situated, he has failed to demonstrate the imposition of mandatory registration violated equal protection.

Finally, we note Kravitz also argues section 290 exempts him from mandatory registration because "[s]ection 288 (c) is specifically excluded by the legislature as being an area in which lifetime registration is mandatory." (RB 2) Not so. It appears Kravitz has mistakenly read section 290's reference to "section 288a" as a reference to "section 288, subdivision (a)," and then erroneously concluded that, because only subdivision (a) is mentioned, subdivision (c) must have been excluded. But section 290 is referring here to section 288a (oral copulation), not to subdivision (a) of section 288 (lewd act with child). Section 290 plainly enumerates "section 288" as one of the crimes for which mandatory registration is required.

The trial court erred by granting Kravitz habeas corpus relief on the theory that imposition of mandatory sex-offender registration violated equal protection under *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1185. We must, therefore, reverse the relief awarded by the trial court.

DISPOSITION

The judgment is reversed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.